FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 470

DEPARTMENT OF HIGHWAYS,
STATE OF LOUISIANA,

Petitioner,

versus

UNITED GAS PIPE LINE COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SYLLABUS.

One who has invoked action by state authorities under state statutes may not later assail that action on the ground that that statute is void under the State Constitution or the Constitution of the United States.

Unied Fuel Gas Co. v. Railroad Commission of Kentucky, 278 U. S. 300, 49 S. Ct. 150, 73 L. Ed. 390;

Fahey v. Mallonee, 332 U. S. 245, 67 S. Ct. 1552, 91 L. Ed. 2030;

Pierce Oil Corporation v. Phoenix Refining Co., 259 U. S. 125, 42 S. Ct. 440, 66 L. Ed. 855;
Hurley v. Commission of Fisheries, 257 U. S. 223, 42 S. Ct. 83; 66 L. Ed. 206.

The issue of constitutionality cannot be entertained upon a dubious presentation but must be specifically pleaded with a showing specifically wherein the statute is unconstitutional.

Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U. S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796;
Merrett v. Shreveport Municipal Fire & Police C. S. Bd., La. App., 2nd Cir., 72 So. (2d) 519.

The concurrent or overlapping use of an area of land does not constitute a taking of property nor does the imposition of the cost of altering utility facilities to accommodate highway improvements.

Pittsburg, etc., Ry. Co. v. Point Bridge Co., 165 Pa. 37, 30 Atl. 511, 26 L. R. A. 323;
Sinclair Pipe Line Company v. Archer County, Texas, 147 F. Supp. 650, affirmed 245 F. (2d) 79;
New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831.

Neither the Fourteenth Amendment nor any other amendment to the Federal Constitution interferes with the proper exercise of the police power by the state or by its agencies acting under delegated and plenary authority.

Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923;

L'Hote v. New Orleans, 177 U. S. 388, 20 S. Ct. 788, 44 L. Ed. 899.

There must be progress, and if in its march private interests are in the way, they must yield to the good of the community.

Hadacheck v. Sebastian, 239 U. S. 410, 36 S. Ct. 145, 60 L. Ed. 348;

Southern Bell T. & T. Co. v. State of Florida, 75 So. (2d) 796.

A police regulation of local aspects of interstate commerce is a power often essential to a state in safeguarding vital local interests, and at least until Congress chooses to enact a nation-wide rule, the power will not be denied to the state.

Freeman v. Hewit, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265;

Erie R. Co. v. Board of Public Utility Com'rs, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322.

The judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether State Legislature, in adopting regulation to promote safety upon its highways and the conservation of their use, acted within its province and whether the means of regulation chosen are reasonably adapted to the end sought.

South Carolina State Highway Department v. Barnell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734.

The judiciary must not strike down a state statute if it is within the state's constitutional power even though it approaches the verge of that power.

Everson v. Board of Ed. of Ewing Tp., 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711.

A presumption of constitutionality exists in favor of a state statute.

Davis v. Department of Labor & Industries of Washington, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246;

Davies Warehouse Co. v. Bowles, 321 U. S. 144, 64 S. Ct. 474, 88 L. Ed. 635.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit and in support of its petition respectfully shows:

OPINIONS BELOW AND JURISDICTION.

The opinion of the United States District Court for the Western District of Louisiana was rendered on August 9th, 1957, and reported at 153 F. Supp. 698, is printed in the appendix hereto.

The original opinion of the Court of Appeals, rendered on March 5, 1958, and reported at ___ F. (2d) ___, is printed in the appendix hereto.

A motion for a rehearing was granted on April 9th, 1958, and is printed in the appendix hereto.

The final opinion of the Court of Appeals, rendered on June 23, 1958, and reported at Fed. (2d) , is printed in the appendix hereto. Rehearing denied August 4th, 1958.

Jurisdiction of this Court lies under 28 USC 1254.

QUESTION PRESENTED AND STATEMENT OF THE CASE.

On April 11, 1951, appellant granted appellee, upon its request and without cost, a permit to install a natural gas pipe line across an existing state highway in Assumption Parish, Louisiana. The permit, designated as Exhibit P-1, stated it was granted subject to certain conditions and those pertinent hereto read as follows:

> "FIRST: That, the rights and privileges granted herein shall be non-exclusive and shall not be construed to be any broader than those expressly set out in Acts of the Legislature of the State of Louisiana, regardless of the language used in this permit and that any fixture or appurtenances placed on the highway right-of-way shall be placed in accordance with existing laws and the standards of the Department of Highways.
>
> "SECOND: That, all fixtures and appurtenances thereto, after having been erected, shall at all times be subject to inspection and the right is reserved to require such changes, additions, repairs, relocations and removal as may at any time be considered necessary to permit the relocation, reconstruction, widening and maintaining of the highway and to provide proper and safe protection to

life and property on or adjacent to the highway, or in the interest of safety to traffic on the highway, and that the cost of making such changes, additions, repairs and relocations shall be borne by the applicant."

Subsequently, appellant undertook a project to widen, realign and reconstruct that highway over the pipe line and requested that appellee extend, at its cost, the encasement of its pipe from ditch line to ditch line of the widened highway and to extend its vent pipes to points at or beyond the new right of way lines. Appellee refused to do so and, on April 24, 1957, appellant petitioned the First Judicial District Court for the State of Louisiana for injunctions to compel performance of the requested work but the case was removed to the United States District Court for the Western District of Louisiana and there dismissed on appellee's motion for summary judgment.

STATUTE INVOLVED.

TITLE 48, SECTION 1, LOUISIANA REVISED STATUTES:

"For the purposes of this Chapter, the following terms have the meanings ascribed to them by this Section, except where the context clearly indicates otherwise:

. . . . . .

"(11) 'Highway' means a public way for vehicular, mounted, and pedestrian traffic, including the entire area dedicated thereto and the

bridges, culverts, structures, appurtenances, and features necessary to or associated with its purposes.

. . . . . .

"(15) 'Right of way' means the area dedicated for use as a highway."

. . . . . .

TITLE 48, SECTION 381, LOUISIANA REVISED STATUTES:

"A. When not inconsistent with the purposes of state highways, the director may issue permits of convenience and necessity for the use and occupancy of the rights of way of state highways as follows:

"(1) For the installation, operation and maintenance of underground pipes, conduits, or cables along or across the highways for the purpose of transporting or conveying fluids, telephone or telegraph messages, gases, or electric current for any purpose.

. . . . . .

"All such installations shall be in accordance with the best modern practice and national underwriting standards and shall be so maintained. Permits shall be issued only to owners of the facility and shall be nonexclusive. Installations which will interfere with the proper operation and maintenance of highways are expressly prohibited.

"No installation may be made except upon the explicit condition that the owner thereof shall,

at no cost to the department, remove or relocate the facility when that is necessary to permit the widening, relocation, or other improvement of the highway, when so ordered by the director."

* * * * * * *

ARGUMENT.

In his reasons for dismissing appellant's suit, the District Judge described the proposed highway project as a "relocation of the highway" (R. p. 54, line 20), as a "new route" (R. p. 55, line 18) and as a "rerouting" (R. p. 55, line 22). This description disturbs us for it is clearly contrary to the facts, as shown by the record, and is the only way in which the cases cited by the District Judge can be made applicable to this action.

In paragraphs 3 and 7 of its petition (R. p. 11), appellant alleged that its construction project was for the widening, realignment and reconstruction of a portion of an existing highway; that the right of way of the existing highway was widened and its roadway would be reshaped and resurfaced under such project. The correctness of these allegations was never denied by appellee and is conclusively shown by its Exhibit D-1 (sent up in the original), which is a map showing the existing roadway to be entirely encompassed by the new or proposed right of way lines.

Where a new highway is constructed across the private right of way of a public utility, there is no question, of course, of the issuance of a permit by the Department of Highways and it always bears the cost of

adjusting or relocating the utility's facilities in such cases. In fact, it is required to do so by statute.

But, under the provisions of Title 48, Section 1, of the Louisiana Revised Statutes, quoted in part above, the term "right of way" means the entire area dedicated for use as a highway and the term "highway" means the entire right of way. A widening of the right of way is in no sense a relocation of a highway nor does it make a new highway out of the old. Yet the test of liability in this case may well be the existence of a prior relationship between appellee and appellant, resulting from joint use of the same area, and the reasonableness of the appellant's request, which could vary with the distance involved in a relocation of a highway. Therefore, it is error to decide this action on the laws, rulings or reasonings applicable only to the relocation of a highway or the construction of a new highway.

We know of no case in any jurisdiction which has directly ruled on the situation prevailing in this case; none of the cases cited by the District Judge involved a mere widening of an existing highway right of way. The leading case of *Panhandle Eastern Pipe Line Co. v. State Highway Commission*, 1935, 294 U. S. 613, 55 S. Ct. 563, 79 L. Ed. 1090, ruled only that the Highway Commission was liable for the costs incurred by a utility in adjusting its pipe lines to accommodate construction of a new highway which crossed the pipe lines for the first time. In this connection the United States Supreme Court said:

> "After the pipes were in operation—1933—the commission adopted plans for new highways

across the company's right of way at six widely separated places."

(55 S. Ct. 565).

Therefore, it is necessary to interpret the language of the permit and that of the statute which authorized its issuance. The District Judge quoted the pertinent provision of the permit (R. p. 55) but did not expressly rule as to the meaning thereof. Apparently, he construed it as applying only to the right of way limits in existence at the time of the installation of the pipe line but there is no sound basis for that view. Stripped of words superfluous to this problem, that portion of the permit reads as follows:

> ". . . The right is reserved to require such changes, additions, repairs, relocations and removal as may at anytime be considered necessary to permit the . . . widening . . . of the highway and . . . the cost of making such changes, additions, repairs and relocations shall be borne by the applicant."

Thus, according to the permit, appellee bound itself to alter or even remove its pine line when required to do so by appellant in order to accommodate the widening of the right of way. Appellee voluntarily assumed this obligation in consideration of the free use of the public right of way for its private purposes. All that appellant has asked in this suit is that appellee be compelled to perform in accordance with the obligation it assumed.

The permit was issued to appellee under the authority of Section 381 of Title 48 of the Louisiana Revised Statutes, the pertinent portions of which are set forth in

an appendix hereto. While the reasons for judgment do not mention this statute, the effect of the judgment is to hold that statute in violation of the State and Federal Constitutions. No Louisiana Court has, to our knowledge, interpreted the meaning of this statute but there is no ambiguity in its terms which forcefully require the public utility to bear the cost of relocating or completely removing its facilities when ordered to do so in order to permit the widening of an existing highway.

By this statute the Legislature of Louisiana has stated the public policy and the police power of the State of Louisiana, delegating the enforcement of that power to the appellant, and we think it would be highly improper to disregard its provisions or to hold them to be without meaning. If the statute is unconstitutional, we respectfully submit that the Court should make a specific ruling to that effect in order to avoid future litigation, if for no other reason.

Appellee contends and the District Judge agrees that requiring appellee to pay the cost of altering the pipe line would constitute a wrongful taking of private property for public use without just compensation. Appellant contends, however, that no property of appellee has or will be taken because its pipe line will occupy the same right of way after the alterations as it used in the past and, since appellee did not own a right of way for a public highway, it has not been deprived of its right of way. This was the reasoning of the court in the case of *Sinclair Pipe Line Company v. Archer County, Texas*, 1956, 147 F. Supp. 650, affirmed by this Honorable Court in 245 F. (2d) 79, although those cases did not decide the question as to liability for the cost of adjusting the pipe lines.

We contend, then, that appellee will lose no property, either real or personal, if required to bear the financial burden which it assumed under the permit and statute and, therefore, there can be no wrongful taking of its property. Any damage the appellee suffers is merely consequential and incidental to the reasonable regulation of its property in the public interest and in accordance with its contract.

Prior to the enactment of the statute in question, the Supreme Courts of Louisiana and the United States held that a city could require the uncompensated relocation of gas pipe lines within the limits of existing city streets. The reasoning was that the gas company had not acquired a vested right to a certain location and was required to comply with the police power regulations. See *New Orleans Gaslight Co. v. Drainage Commission*, 1903, 111 La. 838, 35 So. 929, affirmed on appeal in 197 U. S. 453, 25 S. Ct. 471. In that case the United States Supreme Court said:

> "In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is damnum absque injuria."
>
> (25 S. Ct. 474).

In 1953, the Georgia Court of Appeals considered a case where a city vacated one of its streets in order to enlarge a municipal hospital, requiring Southern Bell Telephone & Telegraph Co. to remove its cables from the street and extend them through the basement of the new hospital. The company refused to do so at its own cost

but the Georgia court held that the franchise from the city could not waive the police power and that by occupying the street the company had assumed the risk of such location and was bound to make such changes as the public convenience and security require without reimbursement. See *City of Macon v. Southern Bell T. & T. Co.*, 1953, 79 S. E. (2d) 265.

In 1954, Kentucky was building a new expressway which crossed numerous established highways upon which Southern Bell had maintained its facilities and it was necessary for the company to remove and relocate them. The Kentucky court held that since the relocation, construction, or reconstruction of highways clearly related to the safety, security and general welfare of the citizens of the State, and all steps taken in furtherance of these objects were matters within the police power of the State, the highway department clearly had power to require the company to make the adjustment of its facilities without compensation. See *Southern Bell T. & T. Co. v. Commonwealth*, 1954, 266 S. W. (2d) 308.

In 1954, Florida was building a new expressway which embraced portions of existing highways along which Southern Bell had located its facilities and a case arose over the question of liability for the cost of relocating those facilities. The Florida Supreme Court held that the statute authorizing utilities to locate within highways must be construed so as to give our forefathers credit for knowing that progress and improvement would never cease; that the streets were built primarily for the traveling public and the company's franchise rights to use them were subservient to the rights of the public. See *Southern*

Bell T. & T. Co. v. State of Florida, ex rel. Ervin, 1954, 75 So. (2d) 796.

The foregoing authorities firmly establish that the public may legally restrict the use of private property when necessary to protect the public interest; that there need be no compensation for such restriction; that utilities locate their facilities within public rights of way at their peril and subject to burdens imposed by the changing needs of the public; that the imposition of a financial burden does not constitute a taking of property; and that a public utility, being vested with the public interest, is more subject to regulation and restriction than is a private individual.

We submit that this case could not have arisen had the appellee not availed itself of the public gratuity in the form of a free license to occupy a portion of the public's property. By doing so, it accepted the implied conditions that civilization is progressive; that public needs are expanding; that traveling speeds and volume are not constant; and that all highways are subject to a future widening when the safety, convenience and comfort of the public require such improvement. By adopting the provisions now found in R. S. 48:381, the Legislature of Louisiana merely stated the implied police power which always existed. It and the permits issued thereunder serve as reminders to public utilities that when they occupy or cross public property, free of charge, they must protect the public from any increase of cost resulting from that occupancy when the highway is widened, relocated, or otherwise improved to meet the needs of the public.

The highways of Louisiana are not the most modern in the world only because sufficient money has never been made available for that purpose. Every dollar of highway funds which is diverted to a non-highway use represents a reduction in the extent to which highways may be improved for the benefit of the public. This case being a contest between two organizations which render valuable services to the public—one for profit, the other without—which one should bear this cost? We say that the appellee and its consumers reap all the benefit from the highway crossing and they should bear all the burdens resulting therefrom. Otherwise, in meeting its highway needs, the public could better serve its interest by prohibiting such crossings than by gratuitously allowing them with the knowledge that it would forever be restricted in its maintenance and improvement of public highways.

Appellee has admitted its responsibility for the cost of work to be done within the original right of way, thereby admitting that, as allowed by the permit and the statute, appellant could have required appellee to move its pipe to another location. Such a move would cost considerably more than the mere encasement in place which appellant demands and would involve considerable work outside the limits of the existing right of way.

From all of the authorities we have studied it is our conclusion that this appellant could have legally refused to issue the permit to appellee in 1951 because the presence of the pipe would restrict the full use of the highway right of way for certain highway purposes and could make more expensive the future improvement of the highway. Upon strong proof that crossing this high-

way was essential to interstate commerce and that the denial would result in an undue burden on interstate commerce, it is probable that appellant could have been compelled to issue the permit but only subject to any reasonable condition or restriction imposed for the protection of the public, presently and in the future, including possible widenings or relocations of the existing highway right of way.

The appellant did not have to permit the crossing at the exact location requested by appellee but, subject to the test of reasonableness, could have required appellee to cross at another location even though doing so would force appellee to acquire additional private right of way and extend its pipes a greater distance, all at extra cost to appellee.

When the present highway widening project was undertaken, appellant could have acquired the necessary additional right of way on each side of appellee's servitude, then required appellee to relocate its pipe to cross at another point, say, fifty or a hundred feet to either side of its present location. This could not have been done capriciously or for punishment but only upon a reasonable justification. Such action would have necessitated appellee's acquiring additional private right of way outside the newly acquired public right of way, or the laying of its pipe within and parallel to the new lines of the highway. Either event would require a greater expenditure by appellee for labor and equipment.

There are many conceivable circumstances which could justify such action by the appellant. For example,

if the pipe had been permitted to cross the highway on the side of an abrupt hill, appellant could now require its relocation to another place in order to eliminate the hill or lower the grade of the highway, say twenty or thirty feet because the increased volume and speed of vehicular traffic requires a greater sight distance than was available for the motorist to proceed with convenience, safety and comfort.

For another instance justifying such action, let us suppose that the appellant, in addition to the present widening project, had laid out a new highway to overpass the present one at the point where it is now crossed by appellee's pipe, touching upon the latter only within the original limits of the highway, but the presence of the pipe would prevent the installation of proper foundations and supports for the overpass structure. Then, certainly, appellant could require appellee to cross elsewhere despite the fact that it would be done at a considerable financial loss to appellee.

As it is, we have a case where the appellee has had the full benefit of free use of public property for almost seven years in a permissive location which has always been subject to change at appellee's peril in order to avoid impending public improvement and progress. Appellee's property will not be taken or damaged but appellee will be put to the inconvenience and cost of performing an act in the public interest which would not have been required had the appellee not subjected itself to the police power by using the public soil to promote its own interests.

On The Rehearing.

A rehearing was granted herein on the petition of appellee which contended that this Court was in error in construing the Louisiana statute (R. S. 48:381), and the permit granted pursuant thereto, as requiring appellee to bear the expense of altering its underroad installations to accommodate a highway improvement project, and that, so construed, the statute would be unconstitutional.

The construction originally given that statute and permit by this Court is in accordance with the plain, unambiguous meaning of the simple words employed therein. Appellee desires a construction which would limit its liability to the cost of altering only that portion of its facilities which were laid within the original right of way but such an interpretation charges the Legislature with doing a futile thing since that liability has always been placed on the utilities without statutory authority. (*New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831).

The purpose of the statute was to express, as a police power, a further regulation of highway use, not previously enunciated by the judiciary, and it was brought about by the increasing number of crossings between utility facilities and highways, and was designed to impose, as the only fee for the use of public lands, the cost of altering the installation so that highways could be widened and relocated without an additional burden to the public.

Coming now to the questions of constitutionality which have but recently entered this case, we contend (1)

that appellee has waived the right to contest the constitutionality of the statute; (2) that appellee has not properly pleaded the unconstitutionality of the statute; and (3) that the statute is constitutional as a valid exercise of the state's police power.

I.

The permit, Exhibit P-1, shows it was applied for by appellee on the standard printed form and approved by appellant on April 11, 1951. If appellee did not approve of the conditions under which the permit could be granted, the time to complain was upon first view of the printed application form and not some six years later when the conditions were enforced. Through this permit appellee acquired the free use of public soil and it cannot now be heard to complain that the statute authorizing that permit is invalid; having reaped the benefits of the statute, it must now accept the burdens imposed thereby. In this connection the United States Supreme Court, in the case of *United Fuel Gas Co. v. Railroad Commission of Kentucky*, 278 U. S. 300, 49 S. Ct. 150, 152, 73 L. Ed. 390, said:

> "It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. (Citing cases). Upon like principle we think that appellants who have procured action by a state commission under a state statute may not assail that action in a federal

court of equity on the ground that that statute, or the one creating the commission, is void under the State Constitution. Cf. Shepard v. Barron, 194 U. S. 553, 24 S. Ct. 737, 48 L. Ed. 1115. The sound discretion which controls the exercise of the extraordinary powers of a federal court of equity should not permit them to be exerted to relieve suitors on such a ground from the very action of state authorities which they have invoked."

Appellee has admitted (R. 36) that it has obtained 551 permits from appellant to cross the state highways and we emphasize that no clearer acceptance of the statute can be shown. Appellee has accepted the benefits of this statute in 551 instances, without being charged a cent therefor, and has waived the right to contest the constitutionality of that statute now that the conditions thereof have proven distasteful to it.

II.

We think the Court was correct in stating, in its original opinion herein, that: "Appellee does not specifically attack the requirement of the statute that the original permit be subject to the obligation to relocate as being unconstitutional." Appellee's claim of unconstitutionality was presented in a vague, casual manner, almost as an afterthought or a catch-all defense; it was not stated in a precise manner that would draw the lines of battle but was pronounced as a general conclusion.

The manner in which the issue of constitutionality was presented was not that which is required in Louisiana courts or the majority of other courts. The Louisiana rule

is concisely stated in the case of *Merrett v. Shreveport Municipal Fire & Police C. S. Bd.*, La. App., 2nd Cir., 72 So. (2d) 519, 528, as follows:

> "All laws are presumed to be constitutional until the contrary is clearly shown and one urging the unconstitutionality of a law must specifically plead its unconstitutionality and show specifically wherein it is unconstitutional. State v. Great Atlantic & Pacific Tea Company, 1938, 190 La. 925, 183 So. 219, certiorari denied Great Atlantic & Pacific Tea Company v. State of Louisiana, 305 U. S. 637, 59 S. Ct. 108, 83 L. Ed. 410; Stovall v. City of Monroe, 1941, 199 La. 195, 5 So. (2d) 547; Ricks v. Close, 1942, 201 La. 242, 9 So. (2d) 534; National Bank of Commerce in New Orleans v. Board of Sup'rs of La. State University and Agricultural and Mechanical College, 1944, 206 La. 913, 20 So. (2d) 264; A. Sulka & Company v. City of New Orleans, 1945, 208 La. 585, 23 So. (2d) 224; and where the pleader's allegations do not state in what respect he is being deprived of property or personal rights without due process of law, such allegations are mere conclusions and need not be considered by the court. Creel v. Creel, 1950, 218 La. 382, 49 So. (2d) 617; Olivedell Planting Co., Inc., v. Town of Lake Providence, 1950, 217 La. 621, 47 So. (2d) 23; Nassar v. Board of Com'rs for Pontchartrain Levee Dist., 1948, 214 La. 214, 36 So. (2d) 761."

This rule is also followed by the United States Supreme Court, as shown by the case of *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 67 S. Ct. 1493,

1498, 91 L. Ed. 1796, wherein the Court, referring to constitutional questions, said:

> "They are not to be entertained upon dubious presentations or, most certainly, when the presentation reasonably may be taken as not intended to put them forward squarely and inescapably."

We, therefore, say that appellee is not entitled to be heard on the question of constitutionality for the additional reason that it has failed to put that question at issue in the proper manner.

III.

It is well to remember that appellee would never have been confronted with the cost appellant has charged to it had appellee not chosen, for reasons of economy, to lay its pipe in a direct line across the public right of way rather than attempt to circumvent it. By doing so it made itself subject to the police power of the state and the conditions of the statute and permit which it so freely accepted and "neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil." *(Erie R. Co. v. Board of Public Utility Com'rs*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322).

In *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510, 515, 516, 82 L. Ed. 734, the Supreme Court made it clear that the exercise of a state's police power in supervising the special uses of highways is proper to conserve their use and pro-

tect the investments made of public funds by saying: "The state has a primary and immediate concern in their safe and economical administration" and could exact a reasonable fee for their use.

Here, the appellee has been allowed to make a special use of a highway and the fee is nothing unless and until that use becomes a burden to the public. Then, all that is required is that appellee protect the public against that burden. What could be more reasonable?

The facts show conclusively that no property of appellee will be taken; it will continue to enjoy the full use of its pipe line in the same place as before and use of the same area by the public is merely a concurrent or overlapping use to that of appellee, just as was the case in the original right of way. See *Pittsburg, etc., Ry. Co. v. Point Bridge Co.*, 165 Pa. 37, 30 Atl. 511, 26 L. R. A. 323; *Sinclair Pipe Line Company v. Archer County, Texas*, 147 F. Supp. 650, affirmed 245 F. (2d) 79; *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831.

Even if the financial burden imposed upon appellee by the statute and accepted by it by means of the permit can be said to be a taking of its property, such a burden is *damnum absque injuria* for neither the Fourteenth Amendment nor any other amendment to the Federal Constitution interferes with the proper exercise of the police power by the state or its agencies acting under delegated and plenary authority. *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923; *L'Hote v. New Orleans*, 177 U. S. 588, 20 S. Ct. 788, 44 L. Ed. 899.

It also has been held that there must be progress, and if in its march private interests are in the way, they must yield to the good of the community. *Hadacheck v. Sebastian*, 239 U. S. 410, 36 S. Ct. 145, 60 L. Ed. 348; *Southern Bell T. & T. Co. v. State of Florida*, 75 So. (2d) 796.

We contend, therefore, that the conditions of the statute are reasonably adapted to the end sought of promoting better highways and conserving their use and the public's investment therein (*South Carolina State Highway Department v. Barnwell Bros., supra*) and the statute is a police regulation of the local aspects of interstate commerce; a power essential to the state in safeguarding vital local interests and which is not denied to the state. *Freeman v. Hewit*, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265.

We respectfully submit that it is not the function of the judiciary to strike down a state statute which approaches the verge of the state's constitutional power unless it is clearly shown that the statute goes beyond that power. *Everson v. Board of Ed. of Ewing Tp.*, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711.

To conclude, we further contend that appellee has failed to make a definite and positive showing that the statute is unconstitutional and has failed to overcome the presumption of constitutionality which exists in favor of a state statute. *Davis v. Department of Labor & Industries of Washington*, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246; *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 64 S. Ct. 474, 88 L. Ed. 635.

CONCLUSION.

It is accordingly submitted that the case at bar involving large sums of the public fisc of petitioner presents an important undecided question for the determination by this Court.

Respectfully submitted,

W. CROSBY PEGUES, JR.,
D. ROSS BANISTER,
W. Crosby Pegues, Jr.
ELTON HUCKABAY,

Department of Highways,
State of Louisiana,
Baton Rouge, Louisiana,
Attorneys for Department of Highways, Petitioner.

CERTIFICATE.

This is to certify that copies of this application for certiorari have been served on opposing counsel on this, the 21st day of October, 1958.

W. Crosby Pegues, Jr.
W. CROSBY PEGUES, JR.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

CIVIL ACTION
NO. 6162

DEPARTMENT OF HIGHWAYS,
STATE OF LOUISIANA

vs.

UNITED GAS PIPE LINE COMPANY

MESSRS.

FOR PLAINTIFF

W. Crosby Pegues, Jr.,
D. Ross Banister, and
Glenn S. Darsey,
Department of Highways,
State of Louisiana,
Baton Rouge, Louisiana.

Elton Huckabay,
Huckabay and Wall,
Louisiana National Bank Building
Baton Rouge, Louisiana.

FOR DEFENDANT

John M. Madison,
Wilkinson, Lewis, Wilkinson and Madison,
Beck Building,
Shreveport, Louisiana.

John T Guyton,
Hargrove, Guyton, Van Hook and Hargrove,
Texas Eastern Building,
Shreveport, Louisiana.

W. O. Crain, and
Frank C. Looney,
United Gas Building,
Shreveport, Louisiana.

Filed August 9, 1957.

BEN C. DAWKINS, JR., CHIEF JUDGE.

REASONS FOR RULING ON MOTION FOR SUMMARY JUDGMENT

The single question presented by this action may be quickly resolved. It is: May the Louisiana Department of Highways (plaintiff), which granted a permit to United Gas Pipe Line Company (defendant), to construct a pipe line under and across a public highway, whereunder the company was required to bear the expense of any further work upon the pipe line necessitated by changes in the highway, require the company to pay the cost brought about by relocation of the highway over the pipe line, at a point outside of the original highway right-of-way?

We already have answered the question in the negative by a minute entry ruling, granting a motion for summary judgment filed by the defendant, having reserved the privilege of filing written reasons for our action.

The facts are undisputed: On April 11, 1951, the Department, pursuant to written request by the company, granted it a permit to cross State Highway 268 at a point in Assumption Parish, Louisiana, with a 26-inch gas pipe line extending from Lirette to Napoleonville. This permit was granted without consideration, but, of course, required the company to bear the expense of the crossing, which was to be performed in accordance with certain engineering standards. It contained a clause, which is the subject of this controversy, reading as follows:

> "SECOND: That, all fixtures and appurtenances thereto, after having been erected, shall at all times be subject to inspection and the right is reserved

to require such changes, additions, repairs, relocations and removal as may at anytime be considered necessary to permit the relocation, reconstruction, widening and maintaining of the highway and to provide proper and safe protection to life and property on or adjacent to the highway, or in the interest of safety to traffic on the highway, and that the cost of making such changes, additions, repairs and relocations shall be borne by the applicant."

The Department now proposes to construct a certain highway project—No. 233-01-03, which is for the widening, realignment and reconstruction of a portion of former State Route No. 268, now designated as Route No. 461. The new route will cross the company's pipe line at a point outside of the original highway right-of-way as it existed on April 11, 1951, when the permit was granted.

Although it will cost only slightly more than $3,000 to effect the changes in the pipe line that will be required by rerouting the highway, our decision here will be of substantial importance for the precedent it will set in this State, where an extensive highway building and improvement program is in progress, and there are many hundreds—perhaps thousands—of gas and oil pipe lines in existence, or to be built, across public roads and highways.

Plaintiff sued defendant in the State Court, praying for a prohibitory injunction restraining defendant from interfering with its proposed highway construction, and a mandatory injunction commanding defendant, at its expense, to perform the work necessary to effect the cross-

ing required by the new highway. Defendant removed the case here, timely filing its answer and motion for summary judgment, which has been argued and briefed by counsel, and submitted for decision. Since there are no issues of fact, the case properly may be decided upon the legal point presented, without a trial.

Defendant freely concedes that, by the terms of the permit, it is responsible for expense involved in necessary readjustment of its facilities because of highway work to be done within the limits of the highway right-of-way, as it existed when the crossing permit was granted; but it insists that, in all right, fairness and reason, there must be a limit to such liability, which, by reasonable construction of the language at issue, should be coterminous with the limits of the original right-of-way boundaries. Otherwise, there would be a wrongful taking of private property for public use without just compensation, in violation of both the State and Federal Constitutions.

We agree. If plaintiff could reroute its highways over pipe lines, at the expense of the pipe line owner, at a distance of one foot beyond the original right-of-way limits, it could do so at any distance. If plaintiff's argument—its construction of the permit—is carried to its logical conclusion, plaintiff could even require a pipe line owner to remove or relocate, at its expense, extremely costly pumping stations or other such facilities, no matter how far they were situated beyond the original highway right-of-way. That position simply cannot be sanctioned. On the authority of *Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas*, 294 U. S. 613, 55 S. Ct. 563, 79 L. E. 1090 (1935); *Pennsylvania*

Coal Company v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. E. 322 (1922); *Buckeye Pipe Line Company v. Keating* (7th Cir., 1956), 229 F. (2d) 795; *Petition of Dreosch*, et al., 223 Minn. 274, 47 N. W. 106 (1951); *Cities Service Gas Company v. Riverside Drainage District*, 137 Kan. 410, 20 Pac. (2d) 520 (1933); *In Re Condemnation of Land at Nahant* (United States, Petitioner), 128 F. 185, modified 136 F. 273, modified 153 F. 520 (U. S. D. C. Mass., 1904); *Commonwealth v. Means & Russell Iron Company*, 299 Ky. 465, 185 S. W. (2d) 960 (1945); *Licht v. State*, 251 App. Div. 524, 298 N. Y. S. 136 (1937); *United States v. Chicago, B. & Q. RR. Co.* (8th Cir., 1936) 86 F. (2d) 131, 106 A. L. R. 942, we believe the motion for summary judgment was properly granted and the suit dismissed.

A proper decree should be presented for signature.

THUS DONE AND SIGNED, in Chambers, in Shreveport, Louisiana, this 9th day of August, 1957.

UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,976

DEPARTMENT OF HIGHWAYS,
STATE OF LOUISIANA,
Appellant,

versus

UNITED GAS PIPE LINE COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(March 5, 1958).

Before RIVES, TUTTLE and CAMERON,
Circuit Judges.

TUTTLE, Circuit Judge: This appeal presents the question whether the trial court correctly construed the contract between the parties as placing on the State Highway Department rather than the Pipe Line Company the expense of altering its under-road installations to meet a change in location of a state highway.

The case was disposed of on a motion for summary judgment which was procedurally proper, because on the undisputed facts there was nothing before the trial court but a construction of a written contract and the Louisiana statute which authorized it.

On April 11, 1951, the Highway Department granted United, at its request and without cost, a permit to install a natural gas pipe line across an existing state highway. This permit contained the following conditions:

> "FIRST: That, the rights and privileges granted herein shall be non-exclusive and shall not be construed to be any broader than those expressly set out in Acts of the Legislature of the State of Louisiana, regardless of the language used in this permit and that any fixture or appurtenances placed on the highway right-of-way shall be placed in accordance with existing laws and the standards of the Department of Highways.
>
> "SECOND: That, all fixtures and appurtenances thereto, after having been erected, shall at all times be subject to inspection and the right *is reserved to require such changes, additions, repairs, relocations and removal* as may at any time be considered necessary to permit the *relocation*, reconstruction, widening and maintaining of the highway and to provide proper and safe protection to life and property on or adjacent to the highway, or in the interest of safety to traffic on the highway, and that the cost of *making such changes, additions, repairs and relocations shall be borne by the applicant.*" (Emphasis supplied).

These conditions were not only authorized but were required by the Statute.[1] Subsequently, in 1956, the Highway Department determined to change the highway[2] in a

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[1] Title 48, Section 1, L. R. S. provides as follows:

"For purposes of this Chapter, the following terms have the meaning ascribed to them by this Section, except where the context clearly indicates otherwise:

. . . .

"(11) 'Highway' means a public way for vehicular, mounted, and pedestrian traffic, including the entire area dedicated thereto and the bridges, culverts, structures, appurtenances, and features necessary to or associated with its purposes.

. . . .

"(15) 'Right of way' means the area dedicated for use as a highway."

Title 48, Section 381, L. R. S. provides as follows:

"A. When not inconsistent with the purposes of state highways, the director may issue permits of convenience and necessity for the use and occupancy of the rights of way of state highways as follows:

"(1) For the installation, operation and maintenance of underground pipes, conduits, or cables along or across the highways for the purpose of transporting or conveying fluids, telephone or telegraph messages, gases, or electric current for any purpose.

. . . .

"All such installations shall be in accordance with the best modern practice and national underwriting standards and shall be so maintained. Permits shall be issued only to owners of the facility and shall be nonexclusive. Installations which will interfere with the proper operation and maintenance of highways are expressly prohibited.

"No installation may be made except upon the explicit condition that the **owner** thereof **shall, at no cost to the department,** remove or **relocate** the facility when that is necessary to permit the widening, **relocation,** or other improvement of the highway, when so ordered by the director." (Emphasis supplied.)

[2] We here use the words "change the highway" rather than "relocate, reconstruct or widen the highway" because it later becomes necessary to construe the latter words and we here use a neutral expression.

manner that, at the point where it passed over United's pipe line it would be entirely outside, although adjacent to, the original right-of-way. The original right-of-way, however, would still be included within the bounds of the new right-of-way. United contends, as the trial court held, that this permit must be construed to mean that United was required to do the things mentioned only within the confines of the right-of-way as it existed at the time the permit was granted. This is clearly at variance with the plain language of the permit and the statute, both of which say that the "owner" shall *relocate* the facility when that is necessary to permit either the widening, *relocation* or other improvement of the highway. Any argument that an agreement to relocate the facility, i. e., the protected pipes as required to permit the relocation of the highway, means to relocate only within a narrow specified area, must be based on something more than ascribing the normal meaning to the words of the permit and the statute.

The argument of appellee is that the requirement that United alter its facilities at a different location to accommodate the new highway crossing constitutes a taking of its property without due process. No citation of authorities is required to support the proposition that the State has no right to invade United's easement or right-of-way or require it to change the location of its pipes in order to build a new road or highway across them *in the absence of a valid agreement to do so.* See *Panhandle Eastern Pipeline Co. v. State Highway Commission of Kansas*, 294 U. S. 613. No such situation exists here, since the right of appellee to traverse the Highway Department's right-of-way in the first place was conditioned on

United's continuing to hold itself ready to accommodate its underroad facility to the course of that same highway as it might be changed from time to time.

Appellee does not specifically attack the requirement of the statute that the original permit be subject to the obligation to relocate as being unconstitutional. It merely says that the proper construction of the statute is that any relocation is restricted to the original right-of-way and that if the statute is read to require modification by United to meet the needs of the same highway if relocated outside the original right-of-way this would amount to a taking of appellee's easement without compensation. The fallacy of this argument is that the statute is not susceptible of the construction placed on it by appellee.

The apprehension expressed by the trial court that if the permit is construed to mean what we hold it says, then the Highway Department could "even require a pipe line owner to remove or relocate, at its expense, extremely costly pumping stations or other such facilities no matter how far they were situated beyond the original right-of-way" is unfounded. No facilities such as pumping stations are dealt with in either the statute or the permit. The grant of authority to permit the traversing of the highway refers only to "underground pipes, conduits, or cables . . . for the purpose of transporting or conveying fluids; telephone or telegraph messages, gases or electric current for any purpose." The Department has no authority to permit the locating of costly pumping stations on the right-of-way, and it is only what is thus permitted that is subject to removal at the cost of the pipe line owner. It goes without saying that if a pipe line com-

pany has a pumping station or other costly facility on private property immediately adjacent to the right-of-way or at any place to which the Highway Department wishes to relocate its roads, it would be required to pay for any such property as it takes either by contract or by condemnation proceedings. It would be in such a case, as well as in one in which an entirely new road was built as to which no prior conditional permit had been given, that such cases as *Panhandle Eastern Pipe Line Company v. State Highway of Kansas*, 294 U. S. 613; *Pennsylvania Coal Co. v. Mahon*, 269 U. S. 393, and *Buckeye Pipe Line Co. v. Keating*, 7 Cir., 229 F. (2d) 795, would apply.

The trial court erred in entering summary judgment for the appellee. Judgment should have been granted for the appellant.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,976

DEPARTMENT OF HIGHWAYS,
STATE OF LOUISIANA,
Appellant,

versus

UNITED GAS PIPE LINE COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(April 9, 1958).

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

PER CURIAM:

The Motion for Rehearing is hereby granted and the opinion and decision of this Court is hereby set aside. The appellee may file additional brief if it should be so advised within a period of ten days from the date of this order. Appellant may file a brief in reply thereto within 20 days from the expiration of such period.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,976

DEPARTMENT OF HIGHWAYS,
STATE OF LOUISIANA,

Appellant.

versus

UNITED GAS PIPE LINE COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(June 23, 1958).

Before HUTCHESON, Chief Judge, and TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This case was previously here and was decided in favor of appellant's contention that the permit granting the appellee the right to traverse a state highway placed upon the Pipe Line Company the expense of altering its under-road construction to meet a change in location of a state highway outside the boundaries of the original highway right-of-way, 5 Cir., F. (2d) . On motion for rehearing we set aside that decision and set the appeal down again for rehearing on further argument and briefs.

The case was disposed of in the trial court on a motion for summary judgment which was procedurally proper, because on the undisputed facts there was nothing before the trial court but a construction of a written permit and the Louisiana statute which authorized it.

On April 11, 1951, the Highway Department granted United, at its request and without cost, a permit to install a natural gas pipe line across an existing state highway. This permit contained the following conditions:

> "FIRST: That, the rights and privileges granted herein shall be non-exclusive and shall not be construed to be any broader than those expressly set out in Acts of the Legislature of the State of Louisiana, regardless of the language used in this permit and that any fixture or appurtenances *placed on the highway right-of-way* shall be placed in accordance with existing laws and the standards of the Department of Highways.
>
> "SECOND: That, all fixtures and appurtenances thereto, *after having been erected*, shall at all times be subject to inspection and the right *is reserved to require such changes, additions, repairs, relocations and removal* as may at any time be considered necessary to permit the *relocation*, reconstruction, widening and maintaining of the highway and to provide proper and state protection to life and property on or adjacent to the highway, or in the interest of safety to traffic on the highway, and that the *cost of making such changes, additions, repairs and relocations shall be borne by the applicant.*" (Emphasis supplied).

In our previous opinion it was said: "These conditions were not only authorized but were required by the statute." Upon careful consideration, and especially in view of the appellant's concession on oral argument that the permit could not validly require more than the statute, we now conclude that the permit did not follow, but added requirements not expressly contained in, the statute.[1] The difference may readily be seen by comparing the italicized parts of the two paragraphs. Whereas the

[1] Title 48, Section 1, L. R. S. provides as follows:

"For purposes of this Chapter, the following terms have the meaning ascribed to them by this Section, except where the context clearly indicates otherwise:

. . .

"(11) 'Highway' means a public way for vehicular, mounted, and pedestrian traffic, including the entire area dedicated thereto and the bridges, culverts, structures, appurtenances, and features necessary to or associated with its purposes.

. . .

"(15) 'Right of way' means the area dedicated for use as a highway."

Title 48, Section 381, L. R. S. provides as follows:

"A. When not inconsistent with the purposes of state highways, the director may issue permits of convenience and necessity for the use and occupancy of the rights of way of state highways as follows:

"(1) For the installation, operation and maintenance of underground pipes, conduits, or cables along or across the highways for the purpose of transporting or conveying fluids, telephone or telegraph messages, gases, or electric current for any purpose.

. . .

"All such installations shall be in accordance with the best modern practice and national underwriting standards and shall be so maintained. Permits shall be issued only to owners of the facility and shall be nonexclusive. Installations which will interfere with the proper operation and maintenance of highways are expressly prohibited.

"**No installation may be made except upon the explicit condition** that the **owner** thereof **shall, at no cost to the department, remove** or **relocate** the facility when that is necessary to permit the widening, relocation, or other improvement of the highway, when so ordered by the director." (Emphasis supplied.)

permit says the right is reserved in the Department of Highways to require such *changes, additions, repairs*, relocations and removal as may be considered necessary, etc., the statute did not include any of the italicized words. We considered the protected pipes passing originally under the highway on the "right-of-way" as "fixtures or appurtenances" which would be "relocated" in case of a relocation of the highway, and we thus held that such relocation was expressly provided for in the permit, even though the appellee contended the relocation for which it was responsible could not extend beyond the boundaries of the original right-of-way.

It now becomes apparent that no fixtures are to be "relocated" or "removed" at all. What the appellant seeks to do is not to require the *relocation* or *removal* of anything but to require appellee pipe line company to *add* protective facilities to its pipe line at the place where the new crossing is to take place. Whatever might be the result, if the statute contained the language that appears in the permit: to "require . . . changes, *additions*, repairs" to permit the relocation of the highway, we now hold that without such language the statute does not permit the Department of Highways to require the pipe line com, any at its expense to make the "changes" and "additions" that would here be necessary to cover and protect its underroad pipes at a point outside the original right-of-way.

The appellee concedes that the statute is to be so construed as to require it to protect its pipes to accommodate any change of location within the boundaries of the original right-of-way. This accords with the decision of the trial court. That judgment is therefore

AFFIRMED.